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No. 99-1181

In The

Supreme Court of the United States

ALBERT ZUCKER, SARAH MANDELBAUM, WEISS & YOURMAN and STULL, STULL & BRODY,

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORP., RAY IRANI, HOWARD COLLINS, WALTER KAUFMANN and LAWRENCE W. SCHONBRUN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals was correct in ruling that the issue of plaintiff class member/objector Walter Kaufmann's standing need not be resolved in order to dispose of petitioners' appeal.

2. Whether, if the Ninth Circuit was incorrect as regards question No. 1, it was nonetheless correct in its determination that Mr. Kaufmann had standing to appeal the district court's initial award of attorneys' fees to the Ninth Circuit, as well as standing to participate in the subsequent district court fee determination proceeding commenced after remand from the Ninth Circuit.

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INTRODUCTION

This petition involves an attempt by two class action law firms to nullify a court-ordered $1.825 million reduction in their attorneys' fee award. The Court of Appeals vacated an initial $2.975 million fee award and remanded the attorneys' fee issue back to the district court for further findings. As a result of the remand, the district court reduced the fee award to $1.15 million.

In order to justify their Petition for a Writ of Certiorari ("Petition"), petitioners (or "class counsel") allege that the issues they have raised "turn upon" an intra-Circuit split of authority regarding standing requirements under Article III, Section 2, of the United States Constitution, and an inter-Circuit conflict within the Ninth Circuit. However, as this opposition will make clear, no such conflicts exist.

In analyzing the instant petition, it is important for this Court to recognize that the sole factual premise upon which this petition is based is a red herring. Plaintiff class member and objector Walter Kaufmann has been a class member at *all* times during this litigation. The class, as defined by class counsel and certified by the district court, consists of "all persons and entities who purchased common stock of Occidental Petroleum Corporation at any time between December 1, 1989, and November 30, 1991."[1] That Mr. Kaufmann sold his Occidental shares at any particular point in time during the pendency of this

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[1] It is telling that nowhere in their petition is the definition of the class of which Mr. Kaufmann is a member ever mentioned.

case is absolutely irrelevant to the issue of his class membership (class counsel's assertion that "Walter Kaufmann may *at one point* have been a class member" (Petition at 5) notwithstanding).

Since petitioners are unwilling to place this case in its proper context, respondent is obligated to do so. The issue which petitioners present to this Court is whether Walter Kaufmann, an unnamed class member/objector in a class action, may appeal the amount of his counsel's fee award, even if any fee reduction would not inure to his financial benefit. This situation was created because class counsel arranged a settlement which provided no financial recovery to the class but provided a payment by defendants of an attorneys' fee to class counsel.

The only other Circuit to consider this circumstance, the Third Circuit in the *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.* (hereinafter *GM Pick-Up)*, 55 F.3d 768 (3d Cir. 1995), ruled that a class member under such circumstances has standing to pursue an appeal of class counsel's fee award:

> Class counsel's argument that objectors have no standing to contest the fee arrangement is patently meritless; the fee arrangement clearly does impact their interests as it is, for practical purposes, a constructive common fund (at 820).

There is no conflict on this issue.

In the instant case, the Ninth Circuit also determined that a class member under such circumstances would have standing to appeal the fee award. However, on the facts specific to this case, the Ninth Circuit ruled that it did not need to resolve the issue of class member

Kaufmann's standing in order to dispose of petitioners' appeal.

STATEMENT OF THE CASE

Because petitioners' Statement of the Case includes numerous misstatements of fact, respondent offers the following corrected Statement of Facts:

1. The litigation underlying this lawsuit was *not* filed on behalf of shareholders of Occidental Petroleum Company. (Petition at 4). It was filed on behalf of "all persons and entities who purchased common stock in Occidental Petroleum Company between December 1, 1989 and November 30, 1991." (Petition, Ninth Circuit Opinion ("Opinion"), Appendix at 2).

2. Walter Kaufmann is *not* a putative (Petition at 4) class member. Kaufmann's purchase of Occidental Petroleum stock during the class period has *never* been questioned.

3. The settlement did not merely "provide for the payment of attorneys' fees and expenses to counsel." (Petition at 4). The settlement provided for defendants' agreement to pay the specific sum of $2,975,000 for attorneys' fees and reimbursement of expenses.

4. The assertion that the issue of the trial court's failure to make proper findings was not even before the court of appeals (Petition at 5) is untrue. Objector raised this issue in his initial appeal, to wit:

1. Whether the trial court, in awarding attorneys' fees of $2.975 million failed to follow Ninth Circuit legal standards:

a) to provide a clear and concise explanation of how it determined $2.975 million was a reasonable fee. (Appellant and Plaintiff Class Member/Objector Walter Kaufmann's Opening Brief, Statement of Issues, Appeal No. 93-56714).

5. The assertion that, during discovery on February 19 and 25, 1997, petitioners learned for the *first* time (Petition at 5) that Walter Kaufmann "may have, at one point" been a member of the subject class, is untrue in two distinct ways. In March of 1993, when Kaufmann filed his objection, petitioners were informed of Kaufmann's class membership.

Secondly, the facts *first* learned by petitioners in 1993 and again in 1997 did not show that Walter Kaufmann *"at one point" "may"* have been a class member. Rather, those facts demonstrated that *at all times* Walter Kaufmann was and continues to be a class member because the class defined by class counsel consisted of "all persons who, during the period December 1, 1989 through November 30, 1991 purchased shares of Occidental Petroleum stock." The sale by Walter Kaufmann of his Occidental shares prior to 1995 did not *in any way* affect Kaufmann's status as a class member.

6. The statement "It became painfully obvious that absent an ownership interest in the stock at issue, Walter Kaufmann lacked any recognizable form of economic or noneconomic interest in the settlement" (Petition at 5, 6) is untrue, as is the statement "Walter Kaufmann failed to

allege or prove the existence of any economic or non-economic injury or any recognizable personal benefit" (Petition at 7, 8). A continuing ownership interest in Occidental stock was never a requirement for class membership. Class membership was defined under Federal Rules of Civil Procedure, Rule 23 by the purchase of Occidental stock during the class period. In fact, the letter accompanying the notice of settlement to class members stated: "Dear current and *former* Occidental common shareholders."

7. The assertions, "moreover he admitted that he expected to obtain no benefit from the results of his objection" (Petition at 6), and "Kaufmann tacitly admitted he had no stake in the outcome of the litigation" (Petition at 6, n.2) are exaggerations. Kaufmann stated "I'm not sure whether I have any personal damages or not. . . . If I do have damages, they'd be relatively small. . . . " (Petition, Kaufmann Deposition, Appendix at 138-39).

8. The district court did not "summarily" (Petition at 7) reduce class counsel's fee. Rather, the court, in an extensive 15-page opinion, explained why it had reduced the fee. (*See* Petition, Order Awarding Attorneys' Fees ("Order"), Appendix at 78-89).

9. The statements that the Ninth Circuit "ignored" the issue of the district court's failure to rule explicitly on Kaufmann's standing and "ignored" subsequently obtained evidence sufficient to override "law of the case" considerations (Petition at 8, n.5) are untrue. As will be shown below, the Ninth Circuit did not ignore either of these issues.

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among The Circuits Regarding The Legal Issue Raised In The Petition

In an attempt to obtain review, petitioners assert that the instant decision creates an "intra-Circuit and inter-Circuit split of authority." (Petition at i). The argument advanced is that because class member Kaufmann will receive no financial gain as a result of the lowering of class counsel's attorneys' fee award, he had no standing to appeal the district court's overruling of his objection to the fee provision of the settlement, and no standing to participate in the remanded hearing on the fee award.

It is true that Kaufmann's recovery under the settlement will not be increased as a result of a reduction in class counsel's fee. However, that is because class counsel structured the settlement so that any reduction in their fee request would benefit the defendant and not class members. Petitioners' argument seems to be that Kaufmann, in selling his Occidental shares, cannot claim even an indirect injury from an excessive fee award as a result of a decrease in Occidental's corporate treasury.

This issue is a red herring because the very case cited by petitioners, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), discusses the injury which confers standing as being a "direct injury" (at 477). So, even if Kaufmann continued to own his Occidental shares, he still would not have standing because the injury which he would claim with regard to Occidental's corporate treasury is

indirect. The implication that continued stock ownership would provide class member Kaufmann with an "actual or threatened injury" sufficient to confer standing (Petition at 28-29) is simply incorrect.

This purported lack of standing of a plaintiff class member/objector, as it relates to appeals of attorneys' fee awards in class actions, was directly addressed by the Third Circuit in *In re General Motors Pick-Up Truck Fuel Tank Product Liab. Litig., supra. GM Pick-Up* was a class action in which class members received no pecuniary recovery under the settlement agreement, while class counsel negotiated a fee for themselves. When class members appealed the trial court's approval of the fee awarded to class counsel, class counsel sought to have the appeal dismissed on standing grounds. Class counsel's argument (identical to the argument of class counsel in this case) was that, since a reduction in the fee award would not benefit the class member/objector appellants but would only benefit General Motors by reducing its payment to class counsel, the class member/objectors lacked standing to appeal the district court's attorneys' fee award. The Third Circuit, citing agency principles (similar to agency principles cited in the instant Ninth Circuit opinion) dismissed class counsel's standing argument out of hand.

> [The] purpose of judicial review is to police abuses, even when defendant pays plaintiffs' fees. In the light of these realities, class counsel's argument that objectors have no standing to contest the fee arrangement is patently meritless; the fee arrangement clearly does impact their interest as it is, for practical purposes, a

> constructive common fund. (*GM Pick-Up, supra,* at 820).

Petitioners also assert that the instant ruling is in conflict with an earlier Ninth Circuit decision, *In re First Capital Holdings Financial Prod. Sec. Litig.* (hereinafter *First Capital*), 33 F.3d 29 (9th Cir. 1994). However, no such conflict exists, and, if it did, it would have been a basis for *en banc* review by the Ninth Circuit, which was not sought and would have been denied.

The court in *First Capital* specifically declined to rule on the question of whether an unnamed class member in a class action has standing to appeal a district court's attorneys' fee award over the objection of a class member. Under the circumstance where the fee is separately negotiated, a successful class member/objector appellant would not financially benefit from a fee reduction. Usually, this circumstance occurs in class action settlements in which class members receive no financial benefit. Class counsel negotiate a payment of their attorneys' fee from the defendants, rather than receiving their fee from the class's settlement fund, because there is no settlement fund. The court in *First Capital* specifically declined to rule on the standing of a class member in such a circumstance.

> The fact that the attorneys' fee was separately negotiated and funded has nothing to do with the outcome of this appeal. It is Wolford's particular lack of injury that is unique. . . . *We do not decide the question of whether another class member could attack the fee award, even though it was separately negotiated and funded.* That question is not before us. (*First Capital, supra,* at 30, n.1; emphasis added).

II.

The Petition Simply Fails To Address The Ninth Circuit Decision Regarding:

(a) The Lack of Necessity of a Separate Jurisdictional Standing Determination As Regards Class Member/Objector Kaufmann; and

(b) The Reasons Why Class Member/Objector Kaufmann Would Have Standing Had Such A Determination Been Necessary

It is most telling that rather than address the Ninth Circuit's decision on its merits, petitioners denigrate the Panel's analysis. They label the Ninth Circuit decision "partisan and result oriented," and deprecate the Panel for employing "cryptic" principles of agency law (Petition at 7) and for being "undeterred by mere facts and evidence" (Petition at 6).

In reality, the Ninth Circuit's reasoning is sound and well-grounded in law. The court ruled that on the facts and related law, both the Ninth Circuit, in its initial remand, and the district court, in its remanded fee hearing, possessed jurisdiction over the issue of the amount of class counsel's attorneys' fee. The court therefore held that it was not necessary to reach the issue of whether class member Kaufmann had standing. "Because the district court had to make this determination to approve an attorneys' fee request of class counsel, regardless of whether Kaufmann had standing, we need not decide whether he did in order to resolve petitioners' appeal." (Petition, Opinion, Appendix at 13-14).

The court began by noting that, had it been necessary to resolve the issue, objector Kaufmann had standing

because he was an "economically interested" class member (Petition, Opinion, Appendix at 10) or, in the words of *United States v. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), he had the "requisite personal interest" in the amount of the fee received by his counsel under the legal principles of:

> (1) principal-agent – "for an agent to accept money from a third party without the principal's consent in the matter for which the agent is employed may be a breach of the agent's fiduciary duty to the principal. . . . " (Petition, Opinion, Appendix at 8);
>
> (2) the attorney-client relationship – "a lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client consents. . . . " (Petition, Opinion, Appendix at 9); and
>
> (3) the fiduciary responsibilities of class counsel to class members in a class action – "because of the attorneys' fiduciary responsibility to the class, of which Kaufmann was an economically interested member. . . . " (Petition, Opinion, Appendix at 10).

The Ninth Circuit went on to discuss why it was not required to reach the question of class member Kaufmann's standing.

With regard to the initial October 1995 Ninth Circuit opinion, the court held that it need not decide whether Kaufmann had standing because the Ninth Circuit decision and order vacating the initial district court fee award had become the law of the case.

With regard to Kaufmann's participation at the remanded proceedings on the attorneys' fee issue in the district court, the Ninth Circuit ruled that it was not necessary to decide whether Kaufmann had standing in order to resolve the district court's jurisdiction to reconsider the fee because:

1. The district court was obligated to reconsider the fee since the Ninth Circuit directed it to do so.

> Because of our previous decision vacating the $3 million award, the district court had to decide upon an award and articulate its reasoning to comply with our mandate. (Petition, Opinion, Appendix at 12).

2. Rule 23 class action responsibilities of the district court resulting from petitioners obtaining class action status for their case provided the district court with continuing equitable jurisdiction over any issue remanded to it as part of its inherent supervisory authority.

> In a class action, where the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. (Petition, Opinion, Appendix at 12).

Therefore, the objector's standing was not necessary to provide jurisdiction to the district court to reconsider the fee award. The duty existed independent of the presence of an objector. The cases cited by petitioners which require an initial party to have standing were satisfied by the allegations of the originally named plaintiffs.

3. A separate Article III case or controversy standing inquiry was unnecessary since the court's fee determination was ancillary to its approval of the settlement. The awarding of a reasonable attorneys' fee was a part of the same equitable jurisdiction with which the court approved the settlement (indeed, the $2.95 million payment to class counsel as attorneys' fees was an actual term of the settlement agreement). The jurisdiction to rule on the settlement did not rest on the objecting class member's standing (i.e., a financial interest or other interest resulting from a fee reduction was unnecessary to provide the court with jurisdiction to rule on the fee award. *See Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), cited at Petition, Opinion, Appendix at 13).

III.

There Is No Justification to Abandon the Ninth Circuit's Application Of The Law Of The Case Doctrine To the Facts Of The Instant Case

In order to reinstate the initial $2.95 million fee award, petitioners claim that the Ninth Circuit improperly applied the law of the case doctrine to evidence discovered at Kaufmann's deposition on February 19, 1997. However, in their discussion of the doctrine, petitioners acknowledge that in order to override the Ninth Circuit's application of the law of the case doctrine, this Court must find that the Ninth Circuit decision "would work a manifest injustice." (Petition at 8, n.5). Just the opposite is true; the granting of this petition would create an injustice. Class counsel are seeking to reinstate a fee

award, which the district court, after reflection and *detailed* analysis (Petition, Order, Appendix 78-89), found excessive and reduced. Petitioners cannot seriously argue that the reinstatement of the initial attorneys' fee award would remedy a "manifest injustice."

Equally important, class counsel have offered absolutely no argument that the redetermined $1.15 million fee was improperly calculated or unreasonable. The only mention they make in their entire petition is to incorrectly characterize the district court as having "summarily" reduced the fee award. (Petition at 7).

Petitioners have utterly failed to present any evidence as to why an award of $1.15 million in attorneys' fees would constitute a "manifest injustice" to class counsel. Indeed, one could justly argue that the court's awarding of $1.15 million was overly generous in light of the questionable benefits which the district court and the Ninth Circuit found resulted from class counsel's settlement of the lawsuit. (Petition, Order, Appendix at 81-82).

CONCLUSION

The respondent respectfully requests that this Court deny the Petition for Writ of Certiorari for the reasons stated above.

Dated: March 13, 2000

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